IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al., | * | |
| Plaintiffs, | * | |
| vs. | * | |
| ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, et al., | * | Case No. 1:18CV1034 |
| | * | Winston-Salem, NC |
| | * | November 21, 2023 |
| Defendants, | * | 10 a.m. |
| and | * | |
| PHILIP E. BERGER, et al., | * | |
| Legislative Defendant Intervenors. | * | |

**TRANSCRIPT OF MOTION HEARING/STATUS CONFERENCE**
BEFORE THE HONORABLE LORETTA C. BIGGS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

| | |
|---|---|
| Plaintiffs: | ARNOLD & PORTER KAYE SCHOLER, LLP<br>BY: PRESTON M. SMITH, ESQUIRE<br><br>FORWARD JUSTICE<br>BY: KATHLEEN E. ROBLEZ, ESQUIRE<br>CAITLIN SWAIN-MCSURELY, ESQUIRE |
| BOE Defendants: | NORTH CAROLINA DEPARTMENT OF JUSTICE<br>BY: TERENCE P. STEED, ESQUIRE |
| Intervenor Defendants: | COOPER & KIRK, PLLC<br>BY: CLARK L. HILDABRAND, ESQUIRE |
| Court Reporter: | Lori Russell, RMR, CRR<br>P.O. Box 1172<br>Mocksville, North Carolina 27028 |

**P R O C E E D I N G S**

**THE COURT:** Would the clerk please call this case.

**THE COURTROOM DEPUTY:** Yes. Calling case 1:18CV1034, North Carolina State Conference of the NAACP, et al., versus Cooper, et al.

**THE COURT:** Good morning to all.

(Simultaneous response.)

**THE COURT:** Before we start, I would like each of counsel to introduce themselves to the Court and for the record. Why don't you tell us who you are and who you're with, who you're here to represent; and then we will move forward.

Yes, sir.

**MR. SMITH:** Good morning, Your Honor. My name is Preston Smith with Arnold & Porter and representing Plaintiffs.

**THE COURT:** All right.

**MS. ROBLEZ:** Good morning, Your Honor. Kathleen Roblez from Forward Justice representing Plaintiffs.

**THE COURT:** All right.

**MS. SWAIN-MCSURLEY:** Good morning, Your Honor. Caitlin Swain, also with Forward Justice, representing the NAACP Plaintiffs.

**THE COURT:** All right. Now, that was Swain?

**MS. SWAIN-MCSURLEY:** Yes, Your Honor, Swain-McSurely.

**THE COURT:** Oh, Swain -- okay. I see you now.

**MS. SWAIN-MCSURLEY:** Thank you so much.

**THE COURT:** Thank you.

**MR. STEED:** Good morning, Your Honor. Terence Steed from the North Carolina Department of Justice representing the State Board Defendants.

**THE COURT:** All right. Thank you.

Yes, sir.

**MR. HILDABRAND:** Good morning, Your Honor. Clark Hildabrand with the law firm of Cooper & Kirk representing the Intervenor Defendants.

**THE COURT:** All right. Thank you.

Now, we are here -- what we currently have before us are two matters. The first is Plaintiffs' objection to the magistrate judge's September 12th, '23, order, and we also have Plaintiffs' motion to set a trial date. We will discuss all of that today.

But I think we best start -- and let me say that there are two outstanding matters that are on the calendar that haven't been addressed. We will address what to do with those today as well, and that is Document 177, the State Board's motion for summary judgment, and Document 184, the motion for a clarification. We will just determine whether or not those are still live and need to be addressed before we proceed with this case.

All right. So why don't we start -- this is Plaintiffs' objection. And are all three of you planning to argue, or is

someone primarily responsible for the argument on this side?

**MR. SMITH:** Good morning again, Your Honor, Preston Smith. Myself and Ms. Kathleen Roblez will be arguing today.

**THE COURT:** All right. Let me hear from you.

**MR. SMITH:** And good morning, Your Honor. My name is Preston Smith again, here on behalf of Plaintiffs.

Your Honor, at the outset, I want to clarify what Plaintiffs are here for today in addition to what Your Honor just mentioned. We are not here to reopen discovery. Plaintiffs are here for two discrete issues: First, to request that this case go to a full trial on the merits as soon as reasonably possible, and second, to seek an order from the Court mandating that the State Board Defendants fulfill their obligations to supplement their disclosures made under Rule 26(a) pursuant to Rule 26(e).

Now, as Your Honor knows, this case will have major consequences for the 2024 elections. It will determine whether Black and Latino voters in this state can vote on equal terms with their counterparts. The implementation evidence that Plaintiffs seek today is highly relevant to Plaintiffs' -- is highly relevant to Plaintiffs' intent and results claims. Your Honor, here today Plaintiffs have narrowed our request for relief significantly, so there will be a minimal burden to the State Board Defendants. (Indiscernible.)

(Court reporter requests clarification.)

**MR. SMITH:** Okay. I'm sorry.

Plaintiffs are only seeking supplementation of the State Board Defendants' Rule 26(a) disclosures as to implementation evidence. As a result of the reduced and narrow nature of Plaintiffs' request for relief, there should be -- the burden on the State Board Defendants should be minimal. In addition to that, Plaintiffs are willing to further meet and confer with the State Board Defendants to make sure that that burden is further lessened.

**THE COURT:** All right. Let me ask you this question: So that is not -- you're not now requesting all of the information that you provided to Judge Auld in your notice?

**MR. SMITH:** That is correct, Your Honor.

**THE COURT:** You are no longer requesting all of that information?

**MR. SMITH:** We are no longer requesting all of the information. That's correct.

**THE COURT:** All right. So you are only requesting information that you believe you're entitled to under Rule 26. Is that what -- is that what you're saying to me?

**MR. SMITH:** And even more narrow than that, under Rule 26 as to implementation evidence only.

**THE COURT:** As to implementation evidence only.

And when you say "implementation evidence," you mean the evidence that you requested that starts at January -- in

January 2023? Is that what you -- what are you -- what is that?

**MR. SMITH:** Sure. So we're talking about implementation evidence following the April 2023 North Carolina State Court -- Supreme -- North Carolina State Supreme Court decision in *Holmes*. So it would be implementation from April 2023 on.

**THE COURT:** All right. So this is much narrower than what Judge Auld was addressing when you were before him --

**MR. SMITH:** Yes, Your Honor.

**THE COURT:** -- is that correct?

**MR. SMITH:** Yes, Your Honor.

**THE COURT:** All right. So let me hear from you.

**MR. SMITH:** So I will discuss our objection to Judge Auld's order, and my colleague Kathleen will discuss -- Ms. Roblez -- excuse me-- will discuss the importance of implementation evidence to Plaintiffs' case.

Your Honor, Plaintiffs respectfully submit that the Court should reverse Judge Auld's order and require supplementation by the State Board of implementation evidence. Judge Auld held, in pertinent part, that because Plaintiffs did not timely serve discovery requests they, quote, "retain no such right to updated information under Rule 26(e)."

Now, Your Honor, that ruling is clearly erroneous and contrary to law as Rule 26(e) places supplementation

requirements both to responses for discovery requests and to disclosures made pursuant to Rule 26(a).

Now, when assessing an objection to a magistrate judge's decision, Rule 72 --

**THE COURT:** Now I'm going to ask you to slow down because I've got to absorb what you're saying and act on it. So I need you to slow down a little bit --

**MR. SMITH:** All right. That's strike two.

**THE COURT:** -- and just talk to me.

**MR. SMITH:** Sorry about that.

When assessing an objection to a magistrate judge's decision, Rule 72 requires a district court judge to -- one, the district judge must consider timely objections to the magistrate judge's order and, two, must modify or set aside any part of the order that is clearly erroneous or contrary to law.

Now, what is the law that is at issue here? There are two different pieces of Rule 26. The first is Rule 26(a)(1)(A)(ii), which governs the initial obligation to disclose, and that reads, in pertinent part, that "a party must, without awaiting a discovery request, provide to the other parties a copy -- or a description by category and location -- of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support his claims or defenses..." So that's the first part of Rule 26

at issue here.

The second part of Rule 26 at issue here is Rule 26(e)(1)(A), which governs a party's obligation to supplement, and that reads, in pertinent part, that "A party who has made a disclosure under Rule 26(a) -- or who has responded to an interrogatory, request for production, or request for admission -- must supplement or correct its disclosure or response in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect..."

Now, there's a couple things I would like to flag about this obligation to supplement under Rule 26(e)(1)(A). Number one is that both the Fourth Circuit and Judge Auld in a ruling have observed that that is a continuing obligation to supplement under Rule 26(e)(1)(A). The Fourth Circuit mentioned this in the case of *Mey*, M-e-y, *v. Phillips*, cite 71 F.4th 203, pincite 214 -- that's a 2023 Fourth Circuit decision -- and the Judge Auld decision regarding a continuing obligation to supplement under Rule 26(e)(1)(A) is *Covil Corp., by and through Protopapas* -- I was going to say that slow regardless of how fast I talked earlier -- and the cite for that is 544 F.Supp. 3d 588. Pincite is 595.

Your Honor, I think it's important to focus on the language that Judge Auld used in that *Covil* case when discussing a party's obligation to supplement under Rule 26(e)(1)(A).

Judge Auld said in his opinion, quote, "Rule 26 imposes a continuing obligation on litigants such that a party, ellipsis, who has responded to an interrogatory or request for production must supplement or correct its response in a timely manner if the party learns that in some material respect the response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the parties during this discovery process or in writing."

So just briefly I want to focus the Court's attention on that ellipsis. Again, it was Rule 26 imposes a continuing obligation on litigants such that, quote, "a party, ellipsis, who has responded to an interrogatory or request for production...."

The second observation from both of those cases I just mentioned is that the duty to disclose extends beyond the close of discovery.

Now, what was Judge Auld's error here that we contend is clearly erroneous and contrary to law? Under Rule 26(e)(1)(A), Judge Auld misapplied the law by holding that Plaintiffs are only afforded the supplementation protections of Rule 26 if using, quote, "formal discovery mechanisms."

That's not what Rule 26(e)(1)(A) requires. Rule 26(e)(1)(A) requires supplementation of both discover -- responses to discovery requests -- that would include responses to interrogatories, requests for production, requests for

admissions -- and Rule 26(a) disclosures. In fact, if you look at the language of Rule 26(e)(1)(A), the obligation to supplement disclosures under Rule 26(a) is listed first in the rule, and then it says the response to discovery requests.

Now, we have the law. We've identified what we contend is Judge Auld's error in the order that we're objecting to. Let's talk about what the State Board Defendants' disclosures were.

First, as a table setting matter, in the parties' joint 26(f) report, the parties said discovery is needed regarding implementation evidence, and that is at ECF No. 77.

Now, there have been two Rule 26(a) disclosures made by the State Board Defendants so far. The first was on October 13th, 2019.

And, by the way, Your Honor, both of these disclosures are attached as exhibits to our objection briefing.

And in that October 13, 2019, disclosure, the State Board Defendants identify implementation evidence that -- under -- pursuant to Rule 26(a).

In addition to that disclosure, there was a supplemental disclosure made by the State Board Defendants on May 15th, 2020, and if you -- so that can be found at page 30 of Docket 211. And if you look at page 3 of that submission, which, again, is a Rule 26(a) supplemental disclosure by the State Board Defendants, it says that -- and I quote -- "...the following is a description by category and location, of those

documents, electronically stored information, and tangible things that State Board Defendants have in their possession, custody, or control and may use to support their defenses in this case." Now, that's on page 3 of their supplemental disclosure.

When you turn to page 4 of their supplemental disclosure, the second-to-last item on the chart says, quote: "All public records concerning the implementation efforts of the SB 824's voter photographic ID requirement by the North Carolina State Board of Elections."

To the right of that they list the location where those materials purportedly were to be found, and then, finally, on that same page, State Board Defendants' brief says that "Defendants will further supplement these disclosures according to Rule 26(e) of the Federal Rules of Civil Procedure."

So what are we left with here? We're left with five things: One, Rule 26(a)'s disclosure requirement; B, Rule 26(e)'s supplementation requirement that extends both to the State Board Defendants' initial disclosures and subsequent disclosures. We have Judge Auld's ruling that Plaintiffs (indiscernible) --

(Court reporter requests clarification.)

**MR. SMITH:** I'll start over. I apologize.

That Plaintiffs submit -- I was doing good too -- that Plaintiffs submit is clearly erroneous and contrary to law that

only responses to discovery requests must be supplemented; and finally, we have Rule 72's requirement that a district court judge must set aside or modify the portion of a magistrate judge's order that is clearly erroneous or contrary to law.

With that, Your Honor, we're only left with one result: That the Court should reverse -- respectfully, the Court should reverse Judge Auld and order supplementation of implementation evidence by the State Board Defendants pursuant to their obligations under Rule 26.

**THE COURT:** And did you argue this with Judge Auld?

**MR. SMITH:** So, Your Honor, we raised that in our notice of proposed discovery and also several other places. This is mentioned in our opposition brief.

So in ECF No. 202 at 5, which is our motion to lift stay and for the status conference, we wrote that we called for the State Board Defendants to update discovery on impacts and litigation -- and implementation. Excuse me.

And ECF No. 203 at 6, which is the notice of proposed discovery that was before Judge Auld, we wrote that we were asking the State Board Defendants to supplement their prior productions on impact and implementation.

And it was also in our reply in support of our notice of proposed discovery where we requested that the State Board, quote, "provide updated information about impact and implementation of SB 824..."

So those issues were before Judge Auld.

**THE COURT:** All right.

**MR. SMITH:** Thank you, Your Honor. And with that I'll pass to my colleague, Ms. Roblez.

**MS. ROBLEZ:** Good morning, Your Honor.

**THE COURT:** Good morning.

**MS. ROBLEZ:** Kathleen Roblez on behalf of NAACP Plaintiffs.

As my cocounsel stated, Rule 26 requires supplementation of all documents in a party's possession that, quote, "it may use to support its claims or defenses." Here Defendants make an argument that implementation evidence is actually not being used by the State Board to support its defenses and is completely irrelevant to this case. Therefore, they argue that the State Board is under no obligation to produce this under the rules and would be prejudiced by having to produce this evidence.

We disagree for three reasons. First, this position defies logic as the State Board itself specifically said in the supplemental disclosures that Mr. Smith read to you that this would be used to support its defenses; namely, records concerning implementation evidence were listed as something that would be used to support its claims or defenses. Furthermore, they have relied upon this type of evidence at every stage of this case: The preliminary injunction, the

motion for summary judgment, even their pretrial exhibits and witnesses that were disclosed at the end of 2021.

Second, this position is not supported by the *Raymond* decision as cited by Defendants and runs contrary to the tests set forth for assessing Section 2 results claims and for Fourteenth and Fifteenth Amendment claims. Both of those require a court to conduct a totality of the circumstances analysis to determine the impact that a voting restriction would have on racial minorities in a state.

Third, the early evidence we have from the 2023 municipal elections is exactly the type of evidence that courts find highly relevant to assessing whether a restriction unduly burdens a racial minority as the way that voter ID is implemented interacts with existing social conditions and, to further compound the discovery, the discriminatory impact of the law itself.

As to the first point, State Board Defendants have repeatedly relied upon implementation evidence to assert that this law does comply with the Voting Rights Act and the Constitution. They have consistently argued that any disparate impact of this law is going to be mitigated by what they call the ameliorative provisions, meaning the provision of free IDs by the DMV and the county board, and the reasonable impediment declaration, which has also been called now the Voter ID Exception Form as it's been implemented.

In the original 26(f) report, we decided that discovery would be needed on this. The State Board's initial and supplemental disclosures included this.

In addition, when you look at the State Board's preliminary injunction briefing, they don't argue that the way it was being implemented was irrelevant. Instead, they cite to an affidavit from the State Board of Elections director, Karen Brinson Bell. They talk about how it was being implemented well, in their opinion. For example, a large number of IDs were being provided; a large number of colleges were having their IDs approved and employers, and that there was an ability for county boards to produce IDs at locations outside of their offices.

They explicitly argued, quote, "There are a number of ways that we are interpreting this law to ensure that it's not too strictly construed," end quote, indicating that implementational evidence on, for example, their temporary rulemaking process in 2023 would be highly relevant to their defenses in this case. They also relied upon this in their motion for summary judgment and in their witness and exhibit list.

As to the second point, the State Board's argument that implementation evidence is not relevant to this case at all because Plaintiffs have brought what they are calling a facial challenge is also inaccurate. This is directly contradicted by

our complaint, which raises claims of discriminatory intent and effect, including an effects-only claim under Section 2 of the Voting Rights Act. All of those claims require an assessment of the totality of the circumstances and are highly fact dependent. Plaintiffs' complaint consistently argues that it is both the law and the implementation that are relevant to each one of its claims.

The State Board relies on *Raymond* here, the Fourth Circuit decision, in our case for this point. The Fourth Circuit in *Raymond* did not address Plaintiffs' Section 2 results claim, and it didn't address whether implementation evidence is discoverable. It merely addressed the relative persuasiveness of implementation evidence in a claim for discriminatory intent only. In addition, the *Raymond* Court in 2020 was reviewing a pre-implementation record.

Courts have consistently assessed the impact of how a state has implemented a photo voter ID law when that implementation has already taken place, which is the case here.

If you look at a case like *Greater Birmingham Ministries* out of the Eleventh Circuit, which is 992 F.3d 1299, that was a case where the voter ID law had already been implemented, and the Court dedicated a considerable amount of time to talking about how it had been implemented. They discuss the "positively identify" provision of the law, the efficacy of mobile voter ID units, and what the voter education had been

surrounding the law.

We saw the same thing in *Lee versus Virginia Board of Elections*, which is 843 F.3d 592. There there was a seven-day trial that included an analysis of the real-world impact of that law, including testimony from witnesses.

Finally, at trial the State Board and Legislative Intervenors will be asking this Court to find that this law does not have a discriminatory impact due largely to this law's ameliorative provisions, but today they're asking this Court to hold that any evidence of how the State interpreted and implemented this law, including its ameliorative provisions, is irrelevant to this case.

It's an undisputed fact that Black and Latino citizens of this state disproportionately lack a current and valid North Carolina driver's license, which is the most commonly accepted type of ID for voting under 824. In addition, in 2023 the State Board made explicitly clear in a numbered memo that revoked, suspended, or canceled licenses are not valid for voting purposes. This greatly broadens the racial disparity that already existed with this law.

Defendants' response has consistently been that these disparities will be cured by the ameliorative provisions. They argue it allows any voter to cast a ballot with or without a photo ID so that the burdens would be limited from this law. The manner in which the law has been interpreted and

implemented in 2023 directly contradicts that argument, and this evidence is highly relevant to any fact-intensive totality of the circumstances assessment of the law.

In the *McCrory* case, plaintiffs warned that voter ID laws trap lifelong voters like Rosanell Eaton in an administrative maze, erecting barriers that seek to disenfranchise Black and Brown voters more so than anyone else. Unfortunately, we saw this happen again in the 2023 municipals.

For example, there was a 95-year-old Black woman living in Nash County who was subjected to that same maze as Ms. Eaton. When she drove up with her son to vote curbside and she explained that she didn't have an ID -- it was lost or stolen -- she was, unfortunately, not given a reasonable impediment form, which she should have been in those circumstances. She was asked to cast a provisional ballot, and her son was required to call the county board, drive her to the county board, have her go out to take a picture, all so that she could cast a ballot when she was an already eligible voter who has been voting in this state. Her son said, "They counted her vote, and that was the outcome of our story. But what would have happened to a person in her shoes who didn't have someone to go back and help them? They would be out of luck, and their vote wouldn't count."

Not every voter was as lucky as her. We also talked to a Black woman from Moore County who presented a current and valid

North Carolina driver's license but was ultimately told she wasn't eligible to vote because the address on that license did not match her voter registration. What happened to her violates the guidance from the State Board. This was a failure in implementation. That guidance says a photo ID for voting doesn't have to have the current address of the voter.

And even if the poll workers did correctly offer reasonable impediment forms to voters, whether or not they're accepted is unacceptably arbitrary, as Plaintiffs have argued all along in this case. In both the October and November municipals in Guilford County, we saw members of the county board questioning what people were putting down on their reasonable impediment declarations, but without any actual evidence that what they wrote was false.

The majority of the Guilford County Board, both in October and November, voted to hold a supplemental hearing to ask those voters to provide evidence, to show up in person if they wanted to. I really want to emphasize one of the things that they said to a voter and put in a letter about why they were questioning them.

In November, there were four voters that the Guilford County Board asked to come to a supplemental hearing, essentially alleging that what they wrote on their form was false. In this case, the voter said they didn't have an ID because they couldn't get transportation, which is a valid

reason to check off on the form. The letter they wrote said, quote, "You were able to obtain transportation and were well enough to vote but did not utilize the same resources to obtain and present photo ID." At both of those hearings, one Board member abstained without giving any reason as to why they weren't counting the vote, didn't provide any evidence of falsity.

Ultimately, those votes counted, but I think it's really important that sending those letters and conducting those hearings is incredibly intimidating to voters, creates a chilling effect, and deters people from considering using this at all.

Those stories are just a few of many. Over 500 voters had to cast a provisional ballot in this year's municipal election. This was for an election where only about 600,000 people voted. Ultimately, over 200 weren't counted for some sort of ID-related issue, either because they weren't able to return to the county board to show a copy of their ID or because their reasonable impediment declaration was rejected.

That's particularly significant when you see how close some of the municipal races are. In Union County's mayoral race, the top two candidates got the exact same number of votes. In Wayne County's mayoral race, the two top candidates were within six votes of each other. As the State Board Director Karen Brinson Bell noted: "Municipal voters are often some of our

most civically engaged individuals." And yet still we saw so many problems with those civically engaged individuals who are regular, consistent voters being able to have their vote counted with the implementation of voter ID.

The problems we saw in 2023 will be magnified in 2024. As I said, only 600,000 people voted in all three municipals. By comparison, in the March 2020 primary, 2.34 million people voted. In the November 2020 general election, 5.5 million people voted. North Carolina voters deserve to have a 2024 general election free from discriminatory voting requirements, and Plaintiffs are asking for a trial to be scheduled in February. That would allow for limited and targeted discovery to provide this Court with a full and evidentiary record, which we think has to include implementation evidence.

**THE COURT:** All right. Let me just speak to the issue of setting a trial date. That is purely within the discretion of the Court and has to operate as this Court can fit this in. We will discuss that later, but that is a Court issue to decide that, not the NAACP. All right.

Now, let me ask you a question. In light of the argument that was made that Judge Auld erred in his order, I would like for you to tell me why you don't believe excusable neglect is an issue in this at all, and that's -- now, I understand you have said that this was not excusable neglect, but I don't know that you have addressed it otherwise. So tell me -- if you

don't believe it's an issue, tell me why it's not an issue.

**MR. SMITH:** Very well, Your Honor.

Excusable neglect is not an issue here because under Rule 72 -- let me pull the language back up. Excusable neglect is not an issue here because we are discussing merely the State Board Defendants' obligation under Rule 26 to supplement disclosures made pursuant to Rule 26(e)(1) -- or made pursuant to Rule 26(a). Rule 26(e)(1)(A) is clear that a party must supplement their disclosures made pursuant to Rule 26(a).

And so because the State Board Defendants did not do that, it takes it out of the motion to reopen discovery and the assessment of whether there was excusable neglect and under the review -- or under the purview, rather, of Rule 26(a), Rule 26(e)(1)(A), and Rule 72, which, again, requires a district court judge to modify or set aside any part of the order that is clearly erroneous or contrary to law.

So because there are several pages in Judge Auld's order where Judge Auld holds that Plaintiffs were not afforded the protections of Rule 26(e)(1)(A) regarding supplementation because these were not discovery requests but were disclosures, that's contrary to law. So we stay within the Rule 72 framework and not any motion to reopen discovery and then the excusable neglect analysis.

**THE COURT:** All right. Thank you.

Let me hear from the Board of Elections, please.

**MR. STEED:** Thank you, Your Honor. Terence Steed for the State Board of Elections.

This -- the Plaintiffs have switched horse in the middle of the race. It's that simple. This is not the issue that was before Judge Auld. They even -- that was exactly how they opened today's argument, that they're not here to reopen discovery. The issue before Judge Auld was a motion to reopen discovery.

**THE COURT:** I agree with that.

**MR. STEED:** Instead, they're now wishing to -- for an order to supplement under Rule 26, which was also not before Judge Auld, and it defies logic why we are now dealing with what is essentially a discovery dispute on a different issue before the district judge when we didn't even receive -- there was no informal request beforehand for supplementation under Rule 26. Instead, they went straight to new discovery requests. You don't need new discovery requests if all you're seeking is supplementation.

So this is where their theory of what actually happened starts to unravel, because if they actually believe that this was supplementation of prior requests, they would never have needed to make the motion to reopen discovery. This is a circular way that they have come around to something that they think they can point to in Judge Auld's order so that they have something to present to Your Honor.

Judge Auld's opinion is well reasoned. It lays out all of the factors of why excusable neglect was not met.

**THE COURT:** This is a de novo review. You do understand that.

**MR. STEED:** Correct.

**THE COURT:** I don't disagree that it is very exhaustive.

**MR. STEED:** My point was only to say that I doubt that I'm going to do better than what he did, and I don't think I have the same page limit that he had. He was able to put a lot more into it. He was able to deal with all these issues and came to the correct decision.

**THE COURT:** Let me tell you, in my reading of all -- I've read all the documents that I had before me that I could read. I will tell you this idea of this Court not having implementation information before it at a trial is troubling to this Court. Now, whether or not you want to argue why I don't have it -- but what we have here -- the essence of what we have here is this Act has been implemented in the state of North Carolina. How could this Court adequately address the issues that I would address at trial and completely ignore that?

So I need you to understand that that's a serious issue with this Court; that before hearing any of this that you've got to say, I had narrowed down what was important to the

Court, and what was important to the Court was implementation information. How can I legitimately have this trial and not have that information in front of me?

So -- so I want you -- I hear what you're saying, that they've changed -- I hear that, and I'm going to let you explore that as much as you want to explore that with me today. But I would be remiss in not telling you what the -- the concern that I walked into this court with today. That is a concern that I walked into this court with today.

So at some point, whether you address it before we finish your argument about whether or not they changed this horse -- this Court believes there is nothing more important than the right to vote, and we have an Act that is -- the constitutionality of this Act is being challenged, and this Court knows that there is implementation information available, and I'm going to be very concerned if that information is not before the Court. So I just want you to know I walked in the courtroom with that kind of issue, was surprised kind of the way he started his discussion.

But you need to appreciate that this Court is here to do justice. I'm not here to just count who may have missed the ball. I'm here to do justice, and doing justice means I believe that I have the -- all the information before me that allows me to make a good decision.

So having said that -- I don't want to cut you off in

midstream, and I don't want you -- I do -- I do want you to argue to me further that this was not a part of the discussion before Judge Auld.

**MR. STEED:** Thank you for helping to illuminate a little bit for me. I would say I don't want to waste time on other issues that aren't as important to Your Honor. So what I would say is that I believe that the State Board adequately addressed all the reasons why this was not before Judge Auld in the papers that we filed, and there's no sense me reading those out to you again.

**THE COURT:** Okay.

**MR. STEED:** So I will turn to your question to make sure that I don't miss any part of it right now.

**THE COURT:** Okay.

**MR. STEED:** And I guess the question that then comes from us as the other side of the "v." in this case is: Is it the Court's role to then go back and -- and replay discovery for them because of mistakes that were made?

If -- I understand Your Honor's concern. Your Honor's concern is that you want a fulsome record before you when we go to trial. I absolutely understand that. To the extent that you're concerned that there are not already documents in this case, there are tens of thousands of documents that came over from the state court case. So all of that evidence came over. That was our agreement from day one.

**THE COURT:** I'm interested in implementation.

**MR. STEED:** Current implementation.

**THE COURT:** Current implementation evidence. We've got before us this trial, and we know that 824 was just implemented in an election. How can I legitimately feel like I've got all the information before me if I don't know what happened with that? I just -- I'm just being perfectly square with you. That's a major concern with me.

Now, he has argued that it was before Judge Auld in the sense that -- but Judge Auld ignored it because -- so my question to you, I guess: Was that implementation issue in the -- in the disclosure that you filed?

**MR. STEED:** So our initial disclosures and our supplemental disclosures were entirely within the framework of the agreement that is memorialized, not made but memorialized, in the Joint 26(f) report, which was: We will produce to you all of the records from the state matter, and if you determine that you need additional evidence, you will make -- and you have the right to make discovery requests beyond that. They never made discovery requests. Our obligation to them and the obligation that we have continued to fulfill -- and if they identify something that I missed from the *Holmes* record, I'll go find it, and I'll send it to them within that obligation.

Our obligation was to provide that; and when we gave initial disclosures, we gave supplemental disclosures, it was

meeting that obligation. The discovery, as I understand it, in the *Holmes* matter, the last things that went out in it were in November of 2020. So it -- it was well past the end of discovery in this case, and yet we have produced those to them.

Now, the point being is that we were under an obligation based on the agreement we made to provide that to them. They were then under the obligation to make discovery requests of their own if they wanted more than what was in the *Holmes* record. That is what they did not do. That is why the issue before Judge Auld was reopening discovery so they could make discovery requests.

**THE COURT:** So -- okay. Okay. I get what you're saying. I get what you're saying.

And you're saying the issue of this supplementation issue with respect to Rule 26 was not before Judge Auld.

**MR. STEED:** They might have said they wanted to supplement evidence in the record. They might have wanted to supplement discovery. They did not say that the State Board is under an obligation to supplement implementation evidence based on the initial disclosures or the supplemental disclosures. That was never before Judge Auld.

This gets back to my point that it defies logic. If that was what they truly believed we had created with those initial disclosures and supplemental disclosures, then why did they then make a motion to reopen discovery? Why was that the issue

brought to the judge?

All they needed to do was send us a letter saying, "Hey, you're under an obligation to supplement implementation evidence."

And we would have said, "No, we don't believe we are."

And then we would have had that fight before Judge Auld, a discovery battle about whether or not we had an obligation to supplement. That never happened. That was not the issue before him, and he never had an opportunity to rule on that. So that's the logic of that argument.

**THE COURT:** All right.

**MR. STEED:** I'm still trying to think about your question of current implementation evidence. I think that ultimately our position on that would come down to the decision in *Raymond* as far as this is a challenge. They -- they would like to say this is not a facial challenge, but they brought this -- before any implementation was happening, they brought this claim, and then they immediately seek a preliminary injunction to stop any implementation.

So the basis, the theory of their case is that on its face, this law is going to result in discriminatory effects, discriminatory impact, and it was motivated by discriminatory intent. Our point is that when they developed that bit of evidence -- and all of the legislative history is in the *Holmes* record already since nothing new happened with this since

*Holmes*. When they took all that to the Fourth Circuit and put that argument before the Fourth Circuit, the Fourth Circuit looked at the law on its face and said that it's not discriminatory.

So our position, which has, again, been put into the motion for summary judgment, is that the issues are ripe for adjudication whether or not they have implementation evidence because -- and -- and I'll continue this. But whether or not they have it, the *Raymond* Court already looked at the law on its face and reached the conclusion that in that particular setting, under that standard of a preliminary injunction, they weren't going to be able to demonstrate a likelihood of success on the merits. (Indiscernible.)

**COURT REPORTER:** You need to slow down, please.

**MR. STEED:** You're right. Sorry.

These are obviously different standards, the motion for summary judgment, but we just submit that it is ripe for adjudication, and we would like it to be heard. But, obviously, that's a separate issue.

**THE COURT:** Right.

**MR. STEED:** I'm sorry. I had another point, but it slipped my mind.

**THE COURT:** And I threw you off. I do apologize. But this is important; and it's important for me, if I'm going to sit as the judge in this case, that I've got before me all

available evidence to make a reasoned, thoughtful, sound decision. I don't know how that happens without -- when this particular law was implemented -- and nobody anticipated it would be three years later and the Supreme Court of the state would have made one decision; that six months later that decision changed. None of that was before this Court at that time. None of us, in my view, could have anticipated that.

But I -- I will hear from you. I'm concerned about where we are, and I'm concerned about there being implementation evidence that is in the hands of the Board of Elections that the Court will not have access to for this trial.

**MR. STEED:** I understand that. I truly do.

And honestly, in my opinion, as a litigator standing before you, I think the answer to that is maybe this particular claim is not the vehicle to seek justice in this court because of the tortured procedural history, because of the way the discovery unfolded, because of where we are in the procedural posture, where we are on the eve of a trial now with this record. And I -- that's their choice, though, to continue. It's my choice to defend it. It's not my choice. It's my obligation to defend it.

**THE COURT:** I understand that.

**MR. STEED:** There's nothing stopping either a ruling from this Court that gets rid of the claims that are currently before it, or a voluntary dismissal from Plaintiffs that would

prevent a future claim that was entirely based upon implementation that happens after the election, and they could start a whole new case -- different parties, perhaps, but a whole new case --

**THE COURT:** Why would they do that? I'm not sure I understand.

**MR. STEED:** My point is that -- Your Honor is discussing how --

**THE COURT:** It's not baseball. This is about -- this is about the right of individuals to vote and that each vote be counted. That's what this Court is concerned about.

**MR. STEED:** I understand.

**THE COURT:** And what -- what -- what I'm concerned about is we know that this implementation information exists; we know that it's in the hands of the Board of Elections, and we know that it -- now, I don't know how burdensome you would tell me that this would be for you to provide this, but I am not going to go into a trial on -- on these issues when I know that implementation information exists, is in the Board of Elections, and may not be burdensome to provide; you just choose to not provide it because they didn't ask the right question, or they didn't follow the right rule.

So I just need you to understand that that's not going to stop this Court from doing what I feel like I need to do in order to have all of the information before the Court for me to

make -- I don't know where we will come down. I don't know what that implementation evidence looks like. But I know that that Act has been implemented -- an election pursuant to that Act has been implemented, and that information exists.

So for -- my next question would be to you: How burdensome does the Board argue that would be? I haven't made a decision. I'm telling you I just read all the documents, and I said, "How am I going to do with a trial without implementation evidence when I know it exists?"

**MR. STEED:** Consistent with our prior filings and especially as this has narrowed as we've gone along, their discovery requests, it would be burdensome to produce implementation evidence. It would delay proceedings and -- as the argument we've made.

But I understand if Your Honor is in a position where you would like to order that to happen, one of my predecessors long ago told me that the best way to respond is that the Department of Justice and the State Board of Elections will do what the Court orders us to do. We will do it. We stand ready to follow your orders.

I would point out, though, that in preparing for this and apparently seeking out examples of how the 2023 municipal elections were implemented, they've reinforced the point that we've made: That what they are looking for is not directly relevant to the law itself as it's written. What it appears

they're looking for is mistakes that were made on the ground by staff members.

And this goes directly to the two points -- the two examples they highlighted, which both, I will agree, are terrible and should not have happened, but what they -- the example they gave was that an elderly woman appeared for curbside voting and was erroneously denied the correct form. So whichever county board member was out there -- county staff member was out there who was supposed to be following the law as it was written made a mistake, the law as it was written did not violate that woman's rights. The person on the ground there who didn't understand what they're doing and made a mistake did.

The second example was in Moore County where they said that the address on the ID didn't match the registration. Again, correct. They are told not to do that. The photo identification is for photo identification purposes, to make sure the person and the name match. The address is not important. And they're told not to do that specific thing that happened, so that person also made a mistake.

It's not the way the law was written. It's not even the way the State Board is implementing it. These are mistakes that were made by people on the ground who didn't -- who, for whatever reason, did it wrong. If those are the two best examples of the 2023 --

**THE COURT:** Well, they probably picked what they thought were the two most egregious examples --

**MR. STEED:** Fair enough.

**THE COURT:** -- to inflame the Court. So I get that. That's a litigation strategy too. I get that.

**MR. STEED:** That's fair. But is then that -- is that what the -- is that what the trial will be, examples repeatedly of irrelevant evidence that are egregious in their own right but not --

**THE COURT:** Well, let me say this: I don't let in a lot of irrelevant evidence into a trial that I'm conducting, so I don't suspect I'll do it in your trial either. But I also would hate to move forward with a trial on this issue knowing that the Board of Elections has within its hands how this was implemented before.

I understand mistakes happen, and I understand that it was new to everybody, and it was sprung on you kind of at the last minute. I get that too. I understand all that. But we don't even get to discuss that if we don't have the implementation evidence. If we believe that the implementation went well and consistent with the law as it is written, then why -- why is this -- why are we here now?

Now, I will tell you when I looked at what their request was before Judge Auld, I said, "No way we're going to open up discovery on all this." And the only thing that jumped off

that page at me was the implementation evidence. That's the only thing that jumped off that page with me, and I said, "Everything else, they just missed the boat. They missed that boat."

So I just want to hear from you -- and I don't want you not to make the argument that you feel like you need for the record in order to -- to preserve these things for appeal. So I don't -- but I do -- I did want to cut to the chase, and I wanted you to know that I walked in this courtroom with that concern; that we've got -- and what I also kind of walked into this courtroom with was it appeared that the N double -- that the Plaintiff and the Board of Elections has worked pretty well together in this process and has exchanged information, some of which the magistrate judge approved, some of which the magistrate judge did not approve. So that was refreshing to the Court, to see litigants conduct themselves in that way.

But I need to understand truly how burdensome it would be to provide that information, what volume of information we're talking about. I just have no worldly idea.

**MR. STEED:** It would be voluminous. We're not just talking about the training materials that go out or training that was conducted at the statewide training. It is every single communication back asking questions. If the -- if the discovery request stands, all implementation evidence since April of 2023, then that's pretty -- it is pretty broad, and so

you then --

**THE COURT:** Since April of 2023?

**MR. STEED:** Correct, this year, when the *Holmes* decision came down from the North Carolina Supreme Court.

**THE COURT:** Right, right.

**MR. STEED:** So the day after that is when the implementation started.

**THE COURT:** Right.

**MR. STEED:** Nothing before that because that was the order in place.

**THE COURT:** Right.

**MR. STEED:** We would be violating an order otherwise.

**THE COURT:** That's right.

**MR. STEED:** So the issue then becomes: Is it every conversation about how it should be implemented? Is it every communication from county boards asking questions or every communication from the State Board answering a question?

It just -- that's where it becomes voluminous, because now we're doing e-discovery searches through email communications that could be overboard, and I've got tens of thousands of emails to search for privilege and all that. That's where it becomes burdensome, in that way.

If there were significant drawbacks on it, obviously we could reach a point where it was no longer burdensome, but I -- if -- especially if it was limited to the instances of the

actual voting and how that was carried out, like the two examples they used, and all the reasonable impediment ballots that were filled out and the results that happened at the county board. Those are all public records anyway, but it -- it's really where we draw the line depends on how burdensome it becomes.

The way that it is currently written is -- would be burdensome, would be voluminous, would take a significant amount of time for me to collect. I know it might not seem like it, but it's really just me and one other person doing the elections work so --

**THE COURT:** All right. All right. And I think what you're saying is reasonable, but that sounds like that could occur with a conversation -- you guys really have worked very well, almost incredibly well. In some of my major litigation that just doesn't happen. I have to resolve every dispute. And -- and I was -- I was pleased that you -- you had worked well together in resolving some disputes that otherwise would have been before the Court. But I'm not sure that that could not be discussed and some reasonable something presented to the Court in terms of the discovery that is being requested.

**MR. STEED:** I understand, Your Honor. I think the State Board's position at this point, given the procedural posture, is that they didn't have a basis to reopen discovery --

**THE COURT:** Right.

**MR. STEED:** -- and they don't have a basis to argue that this is supplemental discovery, and it -- I understand your point, that it would -- it would benefit the Court to have this record -- this implementation evidence in the record.

The issue that comes from my side here is that I'm operating under those rules and arguing under those rules, and I'm not seeing the means by which -- I don't see how the Court gets to that ruling, unless there's something I'm missing.

**THE COURT:** I'm not sure how the Court gets to that ruling. I expressed a concern that the Court has. I've got to figure that out. But that's my job. That's not your job. That's my job.

**MR. STEED:** Right.

**THE COURT:** My job is to figure out how I can get there, if I can get there, but I -- I do want some discussion to occur to determine whether or not that -- that request can be tailored in a way that everybody gets what they need.

The Court is just concerned that 824 has been implemented by the Board of Elections, and that information will not -- if -- if we follow the way this is going, will not be before the Court. So that was me putting you on notice that that is a major concern with the Court.

**MR. STEED:** I understand, Your Honor.

I think as -- to the meeting and conferring issue, I think

if we were -- if we were ordered to provide this evidence, I do believe that we could work well with them. I intend to work well with them in the future, just as we have in the past, notwithstanding this little dispute here. And if we needed to provide that implementation evidence, we could reach a compromise on how much and how far it stretched and -- to get it done.

I don't know that we could do that rapidly to -- with -- under some kind of timeline, like a very short window like they've suggested. I'm not sure that that's possible. I would also -- it would be -- my colleague for the legislative leaders is going to speak.

**THE COURT:** They suggested a trial on February the 4th or something.

**MR. STEED:** Uh-huh.

**THE COURT:** This Court is not available on February the 4th. The Court decides when the trial is going to occur.

**MR. STEED:** And that's why we provided Your Honor with the basic-level elections calendar for the year, because -- trust me. I've got one over here that's a spreadsheet. There are a whole lot of dates in there I didn't tell you about. There -- but the point is that it would be extremely inconvenient and onerous to prepare that quickly for a trial like that when they're in the middle of this implementation, as we're discussing.

But I understand Your Honor's concerns. I think that ultimately the State Board's position is that there's no procedural vehicle to get there currently, and I think the ability to do it is possible. The ability to do it quickly is probably not possible, and the ability to do it without --

**THE COURT:** What do you mean the ability to do it quickly? What does "quickly" mean?

**MR. STEED:** They suggested the February date, as if we were going to be able to do discovery in 30 days and provide all this in the middle of the holiday season with other litigation going on. I don't think that's realistic. That's all I mean.

**THE COURT:** All right. So what do you anticipate would -- would not be quickly? I don't know what you would --

**MR. STEED:** I understand. I really don't know. It depends on how much we narrow it. But if I had to answer, I would say several months, three months possibly, to get --

**THE COURT:** Three months?

**MR. STEED:** I don't know, Your Honor. It's not the only case I have, and it's not the only thing the State Board is doing.

**THE COURT:** Well, guess what. It's not the only case any of us have.

**MR. STEED:** I know, Your Honor.

**THE COURT:** I get that. I do -- I do understand where

we are. I do understand that while -- clearly, the rules are the rules, and this Court understands that. I also understand that I have an obligation to the citizens of North Carolina to give them the fullest trial on this issue that the Court can give to the citizens of North Carolina, not caring about the attorneys but to the citizens of North Carolina; and everything that I've read said if there is implementation evidence, you want that implementation evidence. I'm just -- and that is -- and the Court is there.

**MR. STEED:** I understand, Your Honor. I'm just trying to answer the question knowing -- knowing our obligations. What I don't want to do is say I can do this in five weeks and then turn around and be back to you saying I need more time because of all those other issues.

**THE COURT:** Right.

**MR. STEED:** So I'm trying to give you my best guess, reasonable amount of time.

**THE COURT:** Are those other issues with federal court?

**MR. STEED:** Yes, the three cases before Judge Schroeder, which are going through preliminary injunction phase right now; a third case before -- it's unassigned currently, but it's with Magistrate Judge Webster -- that is also going to go through preliminary injunction phase -- as well as redistricting that was filed yesterday in the Eastern District before Judge Dever.

**THE COURT:** I know this is a busy time.

**MR. STEED:** It's election season, Your Honor.

**THE COURT:** Look, you don't have to tell me. I know this is a busy time.

**MR. STEED:** Yes.

**THE COURT:** And I know -- and this is late.

**MR. STEED:** Those are just the cases from the last month, so --

**THE COURT:** Yeah, I know this is a busy time, as you might appear. All of the courts are very busy with all of these issues now and knew it would be.

**MR. STEED:** Yes. I understand. It's the job, Your Honor. I signed up for it.

**THE COURT:** It's the job.

**MR. STEED:** I would only -- the only other issue that I will discuss with respect to timeline and this particular issue and Your Honor's concern beyond what I've already said is that it would be remiss of me not to mention that my colleague is here for the legislative leaders, who have an interest as well, and they were never part of discovery.

**THE COURT:** And I'm going to give him a chance to be -- isn't that what he's here for?

**MR. STEED:** That's right.

**THE COURT:** I'm definitely going to give him a chance to be heard.

And I want you to put on the record anything you feel like you need to put on the record. I sidetracked your argument --

**MR. STEED:** That's fair.

**THE COURT:** -- because I wanted to get to the heart of this thing, and I wanted you to understand what this Court is sitting here thinking.

**MR. STEED:** I wouldn't be too concerned about that, Your Honor. I had no idea where this would go from the moment we got here, so there wasn't much prepared. I knew it was going to be a stand-on-your-feet-and-answer-questions session.

**THE COURT:** Right.

**MR. STEED:** All I would add is that what we placed in our papers is our position on the relief that they are requesting, and I think that adequately addresses why it should not be granted. Unless Your Honor has additional questions outside of that that you would like me to address, then I think I've made my argument.

**THE COURT:** Well, address for me clearly why you do not believe this is a supplementation issue.

**MR. STEED:** Well, it's for the same reason that I said earlier. What is in the Rule 26(f) is the agreement that had already been reached by the parties before that was submitted, which was: The State Board is going to provide you everything from the state court action that's produced in that discovery, and then beyond that, if you want more, you have to make

discovery requests.

**THE COURT:** So you're saying that the agreement between the parties did not -- did not include the disclosures. Is that what you're saying? What are you saying to me? I don't know what you're saying.

**MR. STEED:** What I'm saying is that the State Board agreed and obligated itself to produce everything from the *Holmes* action. It did not agree and obligate itself to produce the same categories of evidence that came from the *Holmes* action. If they wanted that, they needed to make discovery requests. They didn't make discovery requests, and that's where we are now. That's what was before Judge Auld.

Our position is that when we produced initial disclosures and supplemental disclosures, we were producing *Holmes* state court action, and that's reflected in the attachments to those disclosures, which all list *Holmes* Bates stamps. They are pages of Holmes_SBOE_Production and then Bates numbers that all came from the state court action.

So what they are asking the Court to do and what we are objecting to is treating that as if we obligated ourself to the category of evidence when there was no pending discovery request for it. What we were doing was meeting our obligation under the agreement to produce the *Holmes* records to them.

**THE COURT:** And you have agreed to do that?

**MR. STEED:** We have done that.

**THE COURT:** You've already done that.

**MR. STEED:** As far as I know, I think I have given them everything they asked for this. There is a lot of documents in there. There were a lot of separate productions in there.

**THE COURT:** All right.

**MR. STEED:** And if they identify anything that they think they are missing, which they have before, I will provide it to them.

**THE COURT:** Right. I see.

So you're saying -- what was the document that you indicated that was a part of, I thought, the agreement that went into the 26(f)?

**MR. SMITH:** Your Honor, what I was referring to were the two disclosures made by the State Board Defendants pursuant to Rule 26(a).

**THE COURT:** Okay. All right. But you did not argue that before Judge Auld?

**MR. SMITH:** Briefly, Your Honor.

There are two different places in our papers with Judge Auld regarding the notice of proposed discovery that mention -- where we request supplementation. The first is on page 6. We say: "Plaintiffs request that the State Board Defendants ensure full production of the *Holmes* litigation discovery documents" -- that's not important -- "and supplement

their prior productions on two topics that are directly relevant to Plaintiffs' claims: discovery regarding the present impact of SB 824, particularly on Black and Latino North Carolinians, and information regarding how State Board Defendants are implementing SB 824 for the 2023 municipal elections and beyond."

**THE COURT:** What document are you saying that's in?

**MR. SMITH:** So that is -- if you -- 203 -- 203.

**THE COURT:** 203. Wait just a minute. I have 203. I was looking at that before I came in here.

So what page are you on?

**MR. SMITH:** I'm looking at page 6.

**THE COURT:** Now, this was the notice that you did pursuant to Judge Auld's request.

**MR. SMITH:** That's correct, Your Honor.

**THE COURT:** And so point me to the language that you're talking about.

**MR. SMITH:** So top of page 6, the first sentence on the second line -- if you look at the second line all the way to the right where it starts with "Plaintiffs' request."

**THE COURT:** Uh-huh.

**MR. SMITH:** "Plaintiffs request that the State Board Defendants ensure full production of the *Holmes* litigation discovery documents" -- the key part is now here -- "and supplement their prior productions on two topics that are

directly relevant to Plaintiffs' claims" --

**THE COURT:** "And supplement" -- okay. All right.

**MR. SMITH:** -- "discovery regarding the present impact of SB 824, particularly on Black and Latino North Carolinians, and information regarding how State Board Defendants are implementing SB 824 for the 2023 municipal elections and beyond."

And if I may briefly, Your Honor, additionally, in our reply papers, we make a similar request. That is page -- that is ECF 208.

**THE COURT:** I don't think I -- let me see if I have 208 before me. No.

Do you have an additional copy of that 208 with you? I just want to -- I want to make sure I understand each parties' argument. All right. If you would hand that up, please.

(Document handed to the Court.)

**THE COURT:** Okay. So what were you about to say about 208?

And then I'm going to give you -- I'm going to give the Board of Elections some opportunity to talk to me about that.

What am I looking at in 208?

**MR. SMITH:** This is a -- if you look in the middle of page 1 of 208, the sentence that starts, right down the middle: "State Board Defendants will not be prejudiced..." It's about the sixth line.

**THE COURT:** So this is Plaintiffs' reply in support of the notice of proposed --

**MR. SMITH:** Correct.

**THE COURT:** So that was raised in the notice and reply that you -- so tell me what language you're referencing.

**MR. SMITH:** "State Board Defendants will not be prejudiced by having to complete their previously agreed upon production of the *Holmes* litigation discovery documents and to provide updated information about the impact and implementation of SB 824 before this case proceeds expeditiously to trial."

And in Judge Auld's order, he says explicitly that Plaintiffs were not entitled to updated information under Rule 26 because the requests were not discovery requests, and the point that we're arguing, Your Honor, is Rule 26(e)(1)(A) is for disclosures made under Rule 26(a) and discovery requests.

**THE COURT:** Uh-huh. All right.

**MR. STEED:** My response is that the discovery request they sent to Judge Auld had categories called "Supplementation of Prior Evidence and Discovery Requests" that would then obligate the State Board to produce the same type of evidence that was produced in *Holmes* up through implementation now, and that is precisely my point. This wasn't a request to enforce supplementation under Rule 26.

**THE COURT:** Right.

**MR. STEED:** This was a request to reopen discovery, and in doing that, they put in all the supplemental requests they wanted to make --

**THE COURT:** Right.

**MR. STEED:** -- which was to follow on from the end of the *Holmes* record.

**THE COURT:** Right.

**MR. STEED:** And that's precisely my point. That's not the issue that was before Judge Auld. That's not even the argument they made.

Sure, the word "supplement" appears there --

**THE COURT:** Right.

**MR. STEED:** -- and it also appears in the discovery request.

**THE COURT:** Right.

**MR. STEED:** That doesn't automatically trigger in the Court's mind to sort --

**THE COURT:** An obligation.

**MR. STEED:** -- through and find the argument they're making.

**THE COURT:** I agree. I agree. I've held that. I agree.

**MR. STEED:** So that's our position on it from where we are now. Procedurally postured, that was not before Judge Auld.

**MR. SMITH:** Very briefly, Your Honor?

**THE COURT:** Yes.

**MR. SMITH:** Briefly, but slowly while talking, two points to make.

So in the supplemental disclosure -- again, this is a Rule 26(a) disclosure that was filed in May of 2020 -- the State Board Defendants say that they will disclose "all public records concerning the implementation efforts of the SB 824's voter photographic ID requirement by the North Carolina State Board of Elections." Beneath that they write: "Defendants will further supplement these disclosures according to Rule 26(e)..." That's just the black-letter language of what they wrote.

**THE COURT:** What document is that in?

**MR. SMITH:** That is the State Board Defendants' supplemental disclosures, which we attached to our objection to Judge Auld, which is ECF 211. So there's two exhibits to that brief.

**THE COURT:** And that's exhibit what that you're referencing?

**MR. SMITH:** B.

**THE COURT:** B.

**MR. SMITH:** Yes, Your Honor.

**THE COURT:** Okay.

**MR. SMITH:** And just two more points I'll make

briefly.

The Fourth Circuit, as in -- as included in the State Board Defendants' brief -- or referenced in their brief, there's a 1992 Fourth Circuit case, *US v. George*. It says: "...a district court considers all arguments directed at that issue, even arguments not raised before the magistrate judge." We've just pointed to two points in our papers where that issue was raised.

And then, again, Rule 72, this -- it says that a district court must modify or set aside any part of the order that is clearly erroneous or contrary to law and is a mandatory setting aside or modification. And in Judge Auld's order, there are two to three pages where the Plaintiffs were not afforded the supplementation protections of Rule 26(e)(1)(A) because there were not discovery requests issued, but that's not what Rule 26(e)(1)(A) says. It's Rule 26(a) disclosures, which we just referenced in our notice papers, and then there's the rule that requires a supplementation of those.

**THE COURT:** All right. I think I've got that.

Before I hear from you -- I can't mix apples and oranges. If you would just have a seat, sir. I'm going to give you an opportunity to be heard.

**MR. HILDABRAND:** Yes, Your Honor.

**THE COURT:** I just want to make sure that I have heard what you need me to hear. I did cut your argument off. I've

redirected you. I get that. But it was important to me to get what was in my head out, and -- so your argument is that this matter was not before Judge Auld. That's your position?

**MR. STEED:** Correct.

**THE COURT:** This matter was not before Judge Auld, and that this is outside of his order.

**MR. STEED:** Correct. Even if it was inside the order -- even if it was properly here because it was part of the order, we still don't think they would be entitled to it for the reasons we've already stated; that it wasn't -- it was not a supplementation of *Holmes* category evidence. It was supplementation of just the *Holmes* evidence.

**THE COURT:** Okay.

**MR. STEED:** Right.

**THE COURT:** Now, tell me that again. Maybe I missed that.

**MR. STEED:** This was the same thing you were talking about, why are we not under a duty to -- an obligation to supplement.

**THE COURT:** Yes.

**MR. STEED:** (Indiscernible.)

(Court reporter requested clarification.)

**THE COURT:** Okay. Slow it down. Yes, yes, yes.

**MR. STEED:** A lot of coffee with no breakfast. I apologize.

The duty -- the agreement was to provide the state court evidence, and then if they required additional evidence, then they could make requests for those. Again, that's in keeping with the motion to reopen discovery and the requests for supplemental evidence. There's a direct line that connects all these as the understanding between the parties, and what was in the disclosures was just more *Holmes* evidence. So that remains our position, that that's what we were doing. We were meeting our obligation there.

I think we've beat that particular issue to death for Your Honor. If you think you understand that, I don't have anything more to add to it for the record.

**THE COURT:** All right.

**MR. STEED:** Our papers do address the distinction between a new argument and a new issue, so the cases are there, including *George* that was cited by the Plaintiffs. So we've already addressed that in the papers as well.

**THE COURT:** So you don't think this is a new argument.

**MR. STEED:** No, I think it an entirely new issue, a new request for the Court that wasn't before Judge Auld.

**THE COURT:** Right. And I did read that in your papers. I understand that.

All right. So let me hear from you, sir. I'm sorry.

**MR. HILDABRAND:** Thank you, Your Honor. So first --

**THE COURT:** Remind me of your name.

**MR. HILDABRAND:** Clark Hildabrand.

**THE COURT:** All right. Yes, sir.

**MR. HILDABRAND:** So first to turn to what the scope of the discussion here has been. I want to point out that the document that they are -- that Plaintiffs have pointed to, the State Board Defendants' supplemental disclosures -- when it says "State Board Defendants will supplement these disclosures according to Rule 26(e) of the Federal Rules of Civil Procedure," what they attached at Doc 211, page 29, those disclosures were not disclosures of documents. Those were identifications of various custodians under Federal Rule of Civil Procedure 26(a). There was not any standalone discovery request for any information.

So to the extent that they now try to show this is a motion to supplement, all they could ask for supplementation for would be this identification, which they nowhere have said is an incorrect identification of individuals who would have potentially relevant information.

Because they did not file -- and it was their strategic decision not to file -- not to request any discovery on implementation or serve a 30(b)(6) deposition notice, as they subsequently did. That was their decision. This Court may prefer to have more information before it were this to go to trial, but it's the Court's obligation to consider the issues on the record that the parties present before the Court, and it

was Plaintiffs' decision not to seek and serve discovery for such implementation evidence.

**THE COURT:** Are you telling me it's not my -- I don't have the power to do this? Is that what you're telling me? What are you telling me?

**MR. HILDABRAND:** Your Honor, I'm saying that in federal courts, it's plaintiffs' responsibility to present their cases.

**THE COURT:** And I agree with that 100 percent. I agree with -- I agree with that.

**MR. HILDABRAND:** So to the extent that they now are trying to claim the -- trying to say that they need this implementation evidence, they could have filed a discovery request back when discovery was open. They made the strategic decision not to do so. Another litigant could, if they please, try to do that themselves, but it was these Plaintiffs choice not to seek discovery on implementation evidence and to be satisfied with the *Holmes* evidence that was voluntarily provided to them. So this Court may prefer that there be more information already in the record --

**THE COURT:** And will order it. If I believe I have to have it before me, I will order it.

**MR. HILDABRAND:** I understand, Your Honor.

**THE COURT:** I more than prefer it.

**MR. HILDABRAND:** I understand, Your Honor.

**THE COURT:** All right.

**MR. HILDABRAND:** It's our position that it was Plaintiffs' obligation to seek discovery on this, which they did not do so.

**THE COURT:** I understand.

**MR. HILDABRAND:** So turning from that issue, if this Court were to order that discovery should be what they refer to as supplemented, what in reality is reopened for evidence that was not requested during discovery, then the Legislative Defendants would like to be able to seek the full scope of discovery that they would be able to now as a party and that they were not allowed to do so previously.

So I know this Court discussed time frame for discovery. I think it's probably going to take longer than that because there would be discovery requests that we would serve on Plaintiffs and possibly on the State Board to seek additional information.

**THE COURT:** So did the order from the Supreme Court give you that authority? This Court generally dictates what the intervenors can have and can do.

**MR. HILDABRAND:** This Court made us a party to this case, and as a party to this case, we have a right to seek discovery of the other side in the case. We are defendants just like the State Board is, and we have the right to seek discovery. That right was, respectfully, denied to us by this

Court earlier in the case. The parties also made decisions about the timeline for the discovery process and things like that that we were not allowed to have a say in that decision-making process.

We think that we have -- we have a right to seek discovery of Plaintiffs, especially when today they had mentioned much information that was -- is not even -- they haven't even requested now or that we wouldn't have access to, that we would like in preparation for trial, and also to file a motion for summary judgment, if we so decide. Those were things that normally litigants would have the right to do so in federal litigation, but we were not given the ability to do so, even though we should have been defendants in this case. So for those reasons --

**THE COURT:** Well, you were later ordered to -- your intervention was later allowed. Now, I have not reviewed -- I did not review that intervention order before I came into here and -- into the courtroom, so I don't know that you have that. I don't know. I've got to see what the Court said. But motions to intervene -- generally this Court determines the level of intervention. Now, I don't know if that was addressed in that order, and I will certainly look at that.

**MR. HILDABRAND:** I think, Your Honor -- I think it's quite common for intervenor defendants to be allowed to file for discovery and to file a summary judgment.

**THE COURT:** All right. I will look at that.

**MR. HILDABRAND:** So for those reasons, I think if this -- it would also just be inequitable for the other side to be able to seek discovery of the State Board --

**THE COURT:** So is there a reason that you're trying to keep out the implementation information? Is there something about the implementation information that causes concern for you -- for that to be before the Court?

**MR. HILDABRAND:** The legislature is not -- these laws are constitutional and don't violate the VRA. However, Plaintiffs' claims were facial ones that they brought, and we were content to go forward with the record that was in place there, and we think it's inequitable for them to switch their horse quite a while after this litigation has been going on.

They were wanting to move very quickly while we were excluded from the case to proceed to trial, but then even after the Supreme Court issued its decision allowing us to intervene, they waited nearly a full year in order to try to get this case going again.

So while there's nothing that we're particularly concerned about, we don't think that their claims are really about implementation, and it's inequitable to allow discovery to proceed just on those issues when not giving us a chance to seek similar discovery.

So for those reasons, Your Honor, I think if this Court

were to allow new discovery, which we don't think this Court should do so, we think that we should be given the right to start our discovery anew of Plaintiffs and, to the extent necessary, Defendants.

**THE COURT:** I understand your argument.

**MR. HILDABRAND:** Thank you, Your Honor.

**THE COURT:** All right. Yes, sir.

**MR. SMITH:** Just to respond briefly, Your Honor.

First, as to the argument that was made regarding -- I'm going back to the -- my favorite document today, the supplemental disclosures that were, again, attached to our opposition brief. Counsel said that that was merely just an identification of the category, but the other part in that rule requires you to list the location, and the column on the right lists the location where the State Board said those documents are. So it wasn't merely just an identification, and that's not what the rule requires.

As to discovery, I just wanted to note that Judge Auld gave all the parties an opportunity to file notices of proposed discovery. We were the only ones that did so, obviously unsuccessfully. But we were the only ones that did so.

Finally, as to -- there's been a lot of discussion about, you know, discovery requests versus disclosures under Rule 26(a), and I certainly understand arguments and points made regarding Plaintiffs' ability to notice discovery.

However, this is a distinction regarding a party's obligation to supplement their Rule 26(a) -- Rule 26(a) disclosures.

The Federal Rules of Civil Procedure does not make the same distinction regarding discovery requests and Rule 26(a). Again, Rule 26(e)(1)(A) says: "A party who has made a disclosure under 26(a) -- or who has responded to an interrogatory, request for production, or request for admission -- must supplement or correct its disclosure..."

It doesn't say only if you're made a request -- you're responding to a request -- a discovery request. It says a discovery request or a disclosure under Rule 26(a). So this elevation -- in this particular context, this elevation of discovery request over what Rule 26(e)(1)(A) requires a party to do regarding their 26(a) disclosures is inaccurate.

**THE COURT:** So why did you ask Judge Auld to reopen discovery as opposed to supplement? Help me understand why you did that in the first place. I don't really understand.

**MS. ROBLEZ:** Yes. We were seeking to reopen discovery in this case because of the fact that, obviously, now Legislative Defendants had come into the case. Obviously, at that point it was a much broader request at that time. It was not just for implementation evidence.

And I know they mentioned, you know, we sort of gave these as new requests, but in our proposed discovery before Judge Auld, we set forth a number of requests saying, "We're

just basically copying and pasting what was in *Holmes* and identifying that the majority of our request is just reiterating to the Court that we need supplementation of *Holmes*."

I did want to make a point about that because I've heard a couple times from the other side that if we wanted to, we could have asked for more. But we were happy with the *Holmes* record. The *Holmes* record was not sort of an amorphous thing of just whatever they gave us. We knew what the discovery requests were in *Holmes*, and we looked at those and saw that they covered a wide breadth of implementation evidence. You know, they had asked for, essentially, everything we would have asked for, which is why we did not ask for those exact same things again pursuant to the original agreement, to try to save all the parties' time. So I just want to make sure it's clear that we didn't ask because we understood those to be fully encompassed and very well requested by the lawyers for *Holmes*.

**THE COURT:** All right.

**MR. HILDABRAND:** May I briefly respond, Your Honor?

**THE COURT:** Yes, sir.

**MR. HILDABRAND:** So, first, on the Rule 26 issue -- actually, Rule 26(a) says that it requires a party to provide to the other parties a copy -- or a description by category and location -- of all the documents that -- in its possession, custody, or control that may be used. All that 26(a) requires

is provide a description.

To the extent that they're now claiming that they would like the State Board to supplement their Rule 26(a) disclosures, that should only be about supplementing the description or location, which is their right under the federal rules to limit that. That's all that it requires there. But, again, there's nothing that they have pointed to to say that these Rule 26(a) disclosures were inaccurate or need supplementation.

What really they're seeking to do -- and this is why what they filed with Judge Auld was much broader than seeking to supplement this list of individuals.

**THE COURT:** Yes, it was.

**MR. HILDABRAND:** So they were -- they requested a Rule 30(b)(6) deposition; they requested to depose both of the Intervenor Defendants; they requested to depose several other legislators as well. This is much broader than just supplementing what's shown here on the 26(a) disclosures.

Thank you, Your Honor.

**THE COURT:** All right.

Anything further by either party?

**MR. SMITH:** Not from Plaintiffs, Your Honor.

**MR. STEED:** Not from the State Board. Thank you, Your Honor.

**THE COURT:** Yes, sir.

**MR. HILDABRAND:** No, Your Honor.

**THE COURT:** Now, I have not, of course, ruled on this, and I've got to rule on this to make a determination of whether or not additional information is required.

I did consult with my calendar to determine where such a case could be tried and did determine that starting with the last week in February over into the first two weeks of March I could fit a trial in.

Let me ask each of the parties: With where we are now, before this Court addresses this issue -- then I can think about this as I address the issue. But where we are now, I -- that is a window that I have, but I don't recall the parties' length of trial that was indicated. For some reason eight days is sticking in my head, but I don't recall. And, of course, the Intervenors had not -- were not involved at this point.

So have -- have you done an evaluation -- and I understand this is a projection, but we operate on projections around here. I've got to have some idea in terms of what you believe is the length of this trial that you are requesting.

**MS. ROBLEZ:** I believe what we had suggested earlier was 10 days, and I think we would still --

**THE COURT:** Now, 10 days -- 10 days doesn't mean 10 days of evidence. You understand that. You've got to pick a jury. You've got to do all kinds of other things in that 10 days.

But you're saying you had anticipated 10 days for the trial; is that correct?

**MS. ROBLEZ:** I believe that that is correct to present our evidence.

**THE COURT:** Well, no, no, no. That's not -- that's not what is presented to the Court. That is not what is presented to the Court. We -- we never ask a side how long does it take for you to do your part of the case. We ask what do you anticipate is the length of the trial, and you gave me something between eight days -- I remember eight days, and now you're saying 10 days. So I'm not likely going to give you 10 days to present only your evidence. We do have other trials, lots of other trials. This case is taking precedence over a lot of trials that were ready for trial before you were ready for trial --

**MS. ROBLEZ:** Understood.

**THE COURT:** -- because of the calendar that we're looking at.

So I'm going to accept the 10 days as your estimate in terms of the length of the trial, not your presentation of evidence, and you will conform to that accordingly.

And let me -- let me hear from each of the parties over here.

**MR. STEED:** I was just going to say if they have the joint Rule 26(f), it might have been listed in there what we

thought the trial would be.

**THE COURT:** That may be where I got the eight days.

**MR. STEED:** I don't recall either.

**THE COURT:** I didn't make it up. It came from somewhere.

**MR. STEED:** And I think the State Board's response would be exactly what Your Honor didn't ask for. If it's without a lot of new evidence, then it would likely be largely legal argument from us, which would be then rebuttal. The only case we would be talking about would be rebuttal.

**THE COURT:** Right.

**MR. STEED:** If there is implementation, I don't know how broad that would be, and we would probably come up with some kind of presentation for that.

**THE COURT:** Understood.

**MR. STEED:** The only other thing I would add is -- and please correct me if I'm wrong -- I don't think there was a jury demand. I don't see it in the complaint that I have, unless I'm forgetting about an amended complaint or not.

**THE COURT:** Oh, is this a --

**THE COURTROOM DEPUTY:** It's a bench trial.

**THE COURT:** It's a bench trial.

**MR. STEED:** So just to add that.

**THE COURT:** Well, that's a lot easier, to be quite honest. That's a lot easier. That works for the Court much

better. I will tell you that.

**MR. STEED:** I would only add that the timeline of end of February, early March is even more troublesome to the State Board than the one they suggested because --

**THE COURT:** I get it, but I'm not available.

**MR. STEED:** Right. I understand, Your Honor. I understand, and we will do what the Court asks us to do, like I said before.

**THE COURT:** I do understand, and I was trying to get it done in sufficient time for an order to come out. I am utterly concerned about confusion around all of this. I know the Board of Elections has to have time to inform our citizens what is going to govern their right to vote. I do understand that.

And you're saying you gave me a timeline. I'm not sure I've seen your timeline, but --

**MR. STEED:** It was in response to the motion to set a trial. We stated that we do not oppose the motion; that we leave it in the trial court's discretion.

But we essentially said that absentee voting starts very early in January. In-person voting -- early voting starts on February 15th. The election itself is March 5th, if I'm not mistaken. Then the counties and State Board, that's not the end of their work. They then have canvass afterwards, which is largely -- can be even more intense than the pre-election time

period. That runs through the end of March.

So the period you're talking about, if we were talking about a two-week period at the end of February and beginning of March, is essentially right in their second busiest time of the year, other than the general election.

But following on from that, the calendar continues that unless there's a second primary -- and that only happens if there's multiple candidates and nobody gets above 30 percent. If that were to happen and the second-place finisher requests it, then we do a second primary for that race only. In the previous -- in 2022 -- since that was another redistricting year, so I'm very familiar with it -- we had second primaries, but they weren't statewide. So they can be anywhere from the governor's race to, you know, a local state senate race. So it could just be up in one corner of the state, and it's not a huge burden on anyone.

**THE COURT:** Right.

**MR. STEED:** But I don't know what that will be until we get there.

**THE COURT:** Right.

**MR. STEED:** But for the Court's edification, that means -- that would be in the middle of May. So April and May would then also be a voting season. Again, wide spectrum of how intense that might be. June/July are not voting. Nobody is voting during June and July. And then voting on -- and for

most -- most of August since absentee ballot -- absentee voting starts in September. So there's a good -- obviously, August would be late in the cycle, so I don't think I suggested that.

**THE COURT:** Yes, yes, that would be very late if you want an order to come out of this Court.

**MR. STEED:** I don't think I suggested that. But April, May, June, July is a period where there would be less concern about the burden placed on State Board staff to be part of this and likely the confusion that the Court is concerned about. I mean, obviously --

**THE COURT:** That's good information. You -- I read -- I thought I read your reply, but I just didn't pick that up. But that's good information to know.

**MR. STEED:** Okay. And, yeah, I just -- yeah, the staff members that would be involved likely -- the executive director, the general counsel, people who would sit at the table with me --

**THE COURT:** Right.

**MR. STEED:** -- those are people who are pretty vitally important while voting is ongoing.

**THE COURT:** I do understand.

**MR. STEED:** So it presents a problem with them where they have to choose between being present here and doing their day job. So I -- that is not to say that we couldn't do it. If Your Honor ultimately reaches the conclusion that that is

when trial needs to happen, then we'll show up and be ready for trial.

**THE COURT:** Right. And I do appreciate you saying that. But I'm not trying to make your job harder. I know your job is hard.

**MR. STEED:** Thank you, Your Honor. I appreciate that.

**THE COURT:** I really do. I'm not trying to make it harder, and I really am concerned about voter confusion. Those issues weigh on this Court very heavily, and -- and -- and what it takes for you -- what the Board of Elections must do in order to prepare for it. That's -- that's very important to this Court.

**MR. STEED:** The only thing I would add to that is, as Your Honor well knows, this case has received a lot of attention on its way up to the Supreme Court and back. There have already been orders that have been reversed both in state and federal court. Unfortunately, I think the day it goes to trial presents nationwide headlines probably, and I would -- the confusion problem is a concern for me as well having been through a lot of these before --

**THE COURT:** Yes.

**MR. STEED:** -- and not wanting to have people going to vote with a misconception of what the rules are.

**THE COURT:** That's right. That's right.

Yes, sir.

**MR. HILDABRAND:** So, Your Honor -- and, of course, I'd defer to the State Board on the burden on their staff. I point out for the February date, as I mentioned earlier, we are likely -- if this Court allows additional discovery, we are likely to seek discovery ourselves, and this one discovery dispute has taken several months to resolve. So I -- if we seek discovery, I think it's going to take several months as well. It might take several months for that to be resolved itself.

It also depends on if Plaintiffs are attempting to present any expert testimony at trial. We don't think that they -- they didn't notice any expert during the entire period of discovery, so we don't think they have a right to do so. But it might be their position that they would do so, and if so, we would like to depose that expert. First of all, we would oppose it. We would also like to depose such an expert. We might need to prepare our own experts. This is going to add time.

And I understand the concern about getting this done quickly. Plaintiffs waited quite a long time after the Supreme Court's decision to restart things going here. So that just really -- I understand this Court's concern, but --

**THE COURT:** After the Supreme Court's decision regarding your intervention is what you're saying.

**MR. HILDABRAND:** Right, Your Honor. Nothing happened

in this case for, I think, about eleven months.

**THE COURT:** I do appreciate that.

**MR. HILDABRAND:** So I understand wanting to get it done quickly, but I think, especially if this Court were to issue an order as well, there might be likely an appeal. There's the possibility if this Court issues an order in August, for example, that there might be an appeal of such an order, and that could or could not --

**THE COURT:** I'm not afraid of appeals.

**MR. HILDABRAND:** I understand, Your Honor. My only concern here is just confusion for the voters and for the law on the ground as it's being carried out during the voting periods, that it remains consistent during this time.

**THE COURT:** Well, my concern is about the voters as well; that every piece of information that needs to be before this Court in order to make a reasoned, solid decision be before this Court. That is a concern about the voters. It's not a concern about you; it's not a concern about you; it's not a concern about you. It's a concern about the voters believing -- understanding that the Court has everything before it to make a thoughtful, reasoned decision. That is what drives me.

What you've got going on doesn't drive me, but I do -- now, the Board of Elections does drive me, I will be perfectly honest, because I know the obligation of the Board of Elections

in administering these elections. So that is a major concern for the Court.

**MR. HILDABRAND:** So I understand Your Honor's -- Your Honor's statement on that.

The Legislative Intervenors, of course, we have an interest in making sure that North Carolina law is in place and is followed. I understand if the Court were to enter an order, but it's our position that we would like the law in place for elections that are occurring. We also want to avoid any confusion that could take place.

**THE COURT:** Understood. That is a major issue for me, the confusion that will be caused now. We had a decision by the state that the law was unconstitutional. Six months later, because of the composition of a court, we have a different decision, and now this is before the Court. Talking about confusion, that's confusion.

**MR. HILDABRAND:** Well, thank you, Your Honor.

**THE COURT:** All right. So are there any other -- well, you know what? We did not address the State Board's motion for summary judgment, which is outstanding --

**MR. STEED:** That was actually what I was about to say, Your Honor.

**THE COURT:** -- and the motion for clarification.

**MR. STEED:** I don't know what the motion for clarification is.

**MS. ROBLEZ:** If I understand it correctly, I believe that was when we essentially asked the Court to tell us if we needed to respond to your motion for summary judgment.

**MR. STEED:** Right.

**MS. ROBLEZ:** But we ultimately did respond, and it's fully briefed.

**THE COURT:** Okay.

**MS. ROBLEZ:** So my opinion is that's moot, if I'm understanding correctly.

**MR. STEED:** That sounds correct to me.

**THE COURT:** The motion for clarification is moot.

**MS. ROBLEZ:** Yes, yes, the motion for clarification, yes.

**THE COURT:** Okay. But we do need to address the motion for summary judgment.

**MR. STEED:** We understand it was filed late -- filed late without permission. We nonetheless filed it because we felt there was a valid legal argument to be made, understanding, of course, under 56.1(g) --

**THE COURT:** Yes.

**MR. STEED:** -- that Your Honor may not be able to get to it before trial, and so at that time, we expected that, perhaps, you would be ordering from the bench and then moving right into trial, and -- which was fine. We understood that that could be the situation.

Obviously, the procedural posture has changed. There isn't currently a trial on. Our position would be that it should be reached and ruled upon. Again, the Court has its own docket. The Court knows whether it can get to it before trial or not depending on when the trial is scheduled.

**THE COURT:** We will get to it. We will get to it before trial. No question about that.

**MR. STEED:** In that case, then that's the only request we have on the motion for summary judgment.

**THE COURT:** All right. I just wanted to ask the parties if that was still active and needed to be addressed.

**MR. STEED:** Yes.

**THE COURT:** So you've addressed that.

All right. Anything further from either of the parties?

**MS. ROBLEZ:** Just really briefly to respond to Legislative Defendants.

I think Your Honor understands, because you referenced the competing decisions from the North Carolina Supreme Court, but our intention has always been to move this forward as quickly as possible.

The only reason we waited until after that final *Holmes* decision is because when the Legislative Intervenors were allowed into this case, that state court case had already been granted a petition for discretionary review. It was going quickly up to the highest court, and we know that you had

expressed a concern about these cases kind of proceeding on parallel tracks and how confusing that was.

And I do also want to say to sort of the point of the Legislative Defendants not having any opportunity, they have been in this case since June of 2022, have not so much as filed an initial disclosure, have not themselves requested to reopen discovery, and when given the opportunity by Judge Auld did not themselves file discovery requests. So I just wanted to note that in response.

**THE COURT:** All right. Yes, sir.

**MR. HILDABRAND:** May I respond?

**THE COURT:** You may.

**MR. HILDABRAND:** So in response to that, our position was that we were glad to proceed on the record before the Court. However, if the record is going to be changed now, then we, of course, would like to obtain discovery of the other side there.

They mentioned the state court's decisions, but it was still several months from then until now for when that occurred, and so it's been -- what? -- half a year since then, and if we're going to rush to trial, there's no need to do that when we would -- this Court, we'd recommend, not doing so. If it really were a need to rush to trial, then they should have immediately moved to set the trial date, which, of course, I recognize is in this Court's discretion to choose when the

trial occurs.

**THE COURT:** Well, I do think they moved, like, in a month and a half or two months of that -- in about a month and a half for the Court to set a trial date.

**MR. HILDABRAND:** Well, I think it's been a fairly recent request to set the trial date, and still it's a month and a half, and it's -- all of this is pushing and making it closer and closer to when they're now pushing to have this before 2024 elections. Their first initial request is for February or March, and we -- if the record is going to be reopened, we would like to seek discovery. We don't want to be prejudiced.

**THE COURT:** You've said that about five times. You've said that five times. That's on the record, and I've got it.

**MR. HILDABRAND:** I understand, Your Honor. I just wanted to repeat because it's still relevant to their arguments.

**THE COURT:** Understood. Understood.

**MR. HILDABRAND:** Thank you, Your Honor.

**THE COURT:** Anything further?

Let us adjourn court.

(Proceedings concluded at 11:50 a.m.)

**C E R T I F I C A T E**

I, LORI RUSSELL, RMR, CRR, United States District Court Reporter for the Middle District of North Carolina, DO HEREBY CERTIFY:

That the foregoing is a true and correct transcript of the proceedings had in the within-entitled action; that I reported the same in stenotype to the best of my ability and thereafter reduced same to typewriting through the use of Computer-Aided Transcription.

Lori Russell, RMR, CRR Date: 12/20/23
Official Court Reporter